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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-861

RICHARD LLOYD HARWOOD, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Rene' J. Ortlieb, Attorney, on behalf of Petitioner, prays that a writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Sixth Circuit entered in the above case on October 22, 1974.

Opinions Below

The opinion of the District Court for the Eastern District of Michigan, is not a reported decision. It is therefore appended. Appendix A.

The opinion of the United States Court of Appeals for the Sixth Circuit, is not a reported decision. It is therefore appended. Appendix B.

The Sixth Circuit granted Petitioner's motion to stay issue of the mandate, by Order dated December 3, 1974 so that Petitioner could continue on bond, Appendix B-2.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was made and entered on October 22, 1974, and a copy thereof is appended to this Petition in the Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The petition was first initiated to review petitioner's conviction in Federal Court by guilty plea, pursuant to habeas corpus under 28 U.S.C. §2255.

QUESTIONS PRESENTED

1. Did the Sixth Circuit decide the federal question, of "addressing the defendant personally", as required by Rule 11, in conflict with the applicable decision of this Court, *McCarthy, infra?*
2. Can a pre-sentence report presented to the sentencing judge seven months after a plea of guilty, and never disclosed to the defendant or counsel, satisfy the Rule 11 requirement that the Court be "satisfied that there is a factual basis for the plea"?
3. Is non-disclosure of the pre-sentence report to the petitioner a denial of due process?

CONSTITUTIONAL PROVISIONS AND FEDERAL RULES OF CRIMINAL PROCEDURE INVOLVED

The pertinent rules involved are:

1. Rule 11 reproduced in Appendix C.
2. Rule 32 reproduced in Appendix D.

The Constitutional Provision involved is the 5th Amendment, reproduced in Appendix E.

The United States Supreme Court Rule involved is Rule (19)(1)(b) giving supervisory powers over the lower courts, "or so far sanctioned such a departure by lower court, as to call for an exercise of this court's power of supervision."

STATEMENT OF THE CASE

The petitioner is before this Court after having entered pleas of guilty to three counts of false entry in a bank's records. Petitioner's motions to vacate under 28 U.S.C. §2255 were denied by the district court and affirmed by the Sixth Circuit. Petitioner also raised issues on the unconstitutionality of non-disclosure of the pre-sentence report, which were denied.

Under Rule 11, of the Federal Rules of Criminal Procedure, "The [district] court may refuse to accept a plea of guilty, and shall not accept such plea . . . without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea."

In addition under Rule 11, "The [district] court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

Rule 32 of the Federal Rules of Criminal Procedure did not require a mandatory disclosure to defendant, of presentence materials relied upon for sentence on October 1, 1973 when defendant was sentenced, and no report was disclosed.

The district court, in this case, accepted defendant's pleas of guilty under Rule 11, without addressing the defendant personally as required by *McCarthy* v *United States*, 394 U.S. 459, 22 L.Ed 2d 418, 89 S.Ct. 1166 (1969). Neither did the district Court inquire of defendant for any factual basis for the pleas. There was no discussion by anyone as to any factual basis, either at the taking of the pleas or at the sentencing.

The Court of Appeals affirmed the petitioner's conviction after consideration of Motions to vacate the pleas. The Sixth Circuit found from the lower court record that:

> "At the time the plea was received the district court addressed the defendant personally and made a determination that the plea was voluntarily given with understanding of the nature of the charge and the consequences of the plea." Appendix B.

Petitioner is at a loss to find any basis for such a finding in the lower court record, which is contained in the district court's opinion (attached in Appendix A), within the meaning of *McCarthy, supra.*

As to no factual basis the Sixth Circuit found and held that:

> "The [lower] Court did not inquire as to the factual basis for the plea at that time. However, prior to passing sentence the Court had received an extensive pre-sentence report which this court has examined *in camera* and this report contained a factual basis for the plea of guilty." Appendix B.

Petitioner's main contention as a question for review is the Sixth Circuit's holding that:

> "Rule 11 only requires that the Court be satisfied that there is a factual basis for the plea of guilty before entry of the judgment, not at the time the plea is received." Appendix B.

The Sixth Circuit cites no authority for this announcement.

The petitioner contends that the failure of the district court to disclose the pre-sentence report is a denial of due process. The courts below reject petitioner's contention relying on *United States* v. *Lowe,* 482 F.2d 1357 (6th Cir. 1973).

The Sixth Circuit granted petitioner's motion to stay the mandate to perfect this petition, by Order dated December 3, 1974 so that Petitioner can continue on bond pending disposition in this Court. See Appendix B-2.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed for several good reasons, as to each of the three questions presented.

1. The first question presented, on the lower court's finding that the "district court addressed the defendant personally" on the voluntary nature and the consequences

of the plea, defies and flies in the face of this Court's decision in *McCarthy v. United States*, 394 U.S. 459 (1969).

In the case at bar, the lower court simply asked the petitioner whether or not he knew what was contained in the 3 counts that he was changing his plea to guilty on. The petitioner answered in the affirmative. There was no discussion on the code sections alleged or the facts. See Appendix A.

This Court held in *McCarthy, supra* at pp. 466 and 467 that:

> "Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.
>
> "Thus, in addition to directing the judge to inquire into the defendant's understanding of the nature of the charge and the consequences of his plea, Rule 11 also requires the judge to satisfy himself that there is a factual basis for the plea. The judge must determine 'that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty.' Requiring this examination of the relation between the law and the acts the defendant admits having committed is designed to 'protect a defendant who is in the position of pleading voluntarily with an understanding of the charge but without realizing that his conduct does not actually fall within the charge.'" [Internal cites are to F.R.C.P. 11, Notes of Advisory Committee on Criminal Rules]

Petitioner submits that such a departure from this Court's precedent by the lower court constitutes a decision on a "federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision," within the meaning of this Court's Rule 19.

Petitioner has proceeded to date under this present habeas corpus petition relying on this Court's precedent. Due process requires fundamental fairness. *In Re Murchison*, 349 U.S. 133 (1955). The fair application of the Criminal Rules is the obligation of the district courts. *McNabb* v *United States*, 318 U.S. 332 (1943). As this Court held in *Estes* v *Texas*, 381 U.S. 532 (1965), where the probability of prejudice to the accused is inherent in the circumstances, it is not necessary to find indentifiable prejudice in order to conclude that due process is wanting.

2. The second question presented, demonstrates more reasons why this Court should grant review. The Sixth Circuit held below, without recitation of authority, that a pre-sentence report presented to the sentencing judge seven months after the court accepted th defendant's pleas of guilty, substitutes for the Rule 11 requirement that the court be satisfied that there is a factual basis for the plea before entering judgment.

In the decision below the appeals court held that there is a sufficient distinction between the "entry of judgment" and the "time that the plea is received." Appendix B.

This Court held in *McCarthy, supra*, at 470, that:

> "There is no adequate substitute for demonstrating *in the record at the time the plea is entered* the defendant's understanding of the nature of the charge against him."

The Court in *McCarthy, supra*, discusses in great detail the design and contemplation of Rule 11 to require the district court to make a complete record to assure good pleas as well as provide a complete record for direct and collateral attack. It is illogical to think that the factual basis is a disjunctive requirement of Rule 11, satisfied simply by a judge sifting through a pre-sentence report seven months after the plea was accepted. A report that neither the defendant nor his counsel ever read.

The *McCarthy* Court did not decide the issue of "factual basis for the plea", stating that reversal on the issue of free and voluntary inquiry negated any need to consider the issue in the case, *supra*, at page 464, footnote No.

9. Petitioner contends that this issue should be decided by this Court in the case at bar.

These questions should be reviewed by this Court in light of the fact that most Federal criminal defendants plead guilty.

> "During 1968 approximately 86% (22,055 out of 25,674) of all convictions obtained in the United States district courts were pursuant to a plea of guilty or its substantial equivalent, a plea of nolo contendere. 1968 Director of Administrative Office of the United States Courts Annual Report 261." *McCarthy*, at p. 464 footnote 7.

3. The third question presented for review raises additional reasons why this petition should be granted. Petitioner submits that failure to disclose the pre-sentence report in this case is a denial of due process.

The law in the Sixth Circuit is that there is no requirement that pre-sentence reports be disclosed to defendants or their counsel. *United States* v *Lowe*, 482 F.2d 1357 (6th Cir. 1973).

In the Tenth Circuit there is no obligation for disclosure of pre-sentence reports. *United States* v *Stidham*, 459 F.2d 297 (10th Cir. 1972). Likewise in the Fourth Circuit. *United States* v *McKinney*, 450 F.2d 943 (4th Cir. 1971). Likewise, in the Fifth Circuit. *United States* v *Warren*, 432 F.2d 772 (5th Cir. 1970).

The Rule appears to be full disclosure in the Ninth Circuit. Concurring opinion of Judge Browning, *Verdugo* v *United States*, 402 F.2d 599, 613 (9th Cir. 1968), Cert. denied 402 U.S. 961 (1971). See also *United States* v *Weston*, 448 F.2d 626 (9th Cir. 1971).

Petitioner submits that the variation of practice on this issue is an important federal question that should be decided by this Court.

In addition petitioner submits that this question should be reviewed to ascertain whether or not non-disclosure of pre-sentence reports is in violation of due process.

During the pendency of a defendant's contacts with the sanctions of the criminal law, sentencing is by definition of primary importance to defendant's freedom. When a

defendant stands subject to lose, at the very least, some form of freedom, the ultimate of humane treatment and due process are in order. Sentence must be imposed in a manner that will best protect society through effectively balancing its goals of criminal sanctions, i.e., deterrence, incapacitation and reformation, and its cherished principles of justice and fair play, while at the same time seeking to correct and rehabilitate offenders so that upon their return to full members of society they will be functioning productive members of society. See Note, *Procedural Due Process at Judicial Sentencing for a Felony*, 81 Harv. L. Rev. 821-825 (1968).

This crucial and critical step in the administration of our criminal justice system is subject to all of the procedural safeguards of due process. Any sentencing which lacks adherence to the Constitution's fundamental scheme of ordered liberty is contrary to due process. *Palko* v *Connecticut*, 302 U.S. 319, 325 (1937), *Verdugo* v *United States*, *supra*.

The Ninth Circuit in *United States* v *Weston*, *supra*, said:

> "A rational penal system must have some concern for the probable accuracy of the informational inputs in the sentencing process."

If the defendant's right to speak prior to sentence under Rule 32 (a)(1) of the Federal Rules of Criminal Procedure, is to have meaning, the defendant must know the factual questions before the judge, if the right is to be more than a hollow shell of "speak now or forever hold your peace."

CONCLUSION

For the reasons discussed above petitioner prays this Honorable Court to review his conviction in this cause. It is respectfully submitted that this petition for a writ of Certiorari should be granted.

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff, Respondent,

vs.

RICHARD LLOYD HARWOOD,
Defendant, Petitioner.

Criminal No. 5613

Civil No. 74-10032

ORDER DENYING MOTION FOR WITHDRAWAL OF PLEA OF GUILTY PURSUANT TO RULE 32 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND OF MOTION TO SET ASIDE PLEA OF GUILTY PURSUANT TO SECTION 2255, TITLE 18 U.S.C.

Under date of February 5, 1973 the within defendant Harwood, in the presence of his retained counsel, entered a plea of guilty to Count One, Count Three and Count Five of a 36-count Indictment; Count One charging the said defendant with a violation of Section 1005, Title 18 U.S.C., Count Three charging a violation of the same section, and Count Five charging a violation of the same section; all three of the counts charging the defendant with a false entry in the books and records of the Peoples State Bank of East Tawas, East Tawas, Michigan, at a time when the defendant was President of the said bank. The entire thirty-six counts involve allegations charging the defendant Harwood, as President of the said bank, with irregularities in the operation of the said bank during the period of time covered by the said separate counts.

The transcript of the proceedings involving the foregoing plea of guilty is as follows:

Detroit, Michigan
Monday, February 5, 1973
11:00 a.m.

CLERK OF THE COURT: 5613, United States v. Richard L. Harwood.

MR. HAUSNER: Good morning, your Honor.

We are here this morning for the purpose of a change of plea, partial change of plea. I have been informed by Mr. Woods, who is here with his client, Mr. Harwood, that at this time his client wishes to withdraw his plea of Not Guilty entered by the Court on January 8 as to Counts 1, 3 and 5 of the Indictment.

Should the Court see fit to accept the plea of Guilty as to those three counts, the Government would move that Counts 2, 4 and 6 through 36 be held in abeyance.

THE COURT: Is that plea agreeable to the Government?

MR. HAUSNER: Yes, it is, your Honor.

THE COURT: All right, Mr. Woods.

MR. WOODS: I have discussed this matter in depth and at length on several occasions with Mr. Harwood, your Honor. He has been advised that he could be tried either by the Court or Jury in this matter. He knows that each one of the three counts carries a maximum of $5,000 fine and/or five years imprisonment.

He also understands that the plea must be voluntarily made on his part and only for the reason that he is, in fact, guilty of those three counts.

He understands that no threats, promises or inducements have been made to him, and he is here this morning, your Honor, for the purpose of offering a plea of Guilty to Count 1, Count 3 and Count 5.

I might say for the purpose of the record that this is a Northern Division case before your Honor.

THE COURT: All right, Mr. Harwood, you have heard your attorney, Mr. Woods, advise the Court that you desire to withdraw your plea of Not Guilty to

Counts 1, 3 and 5 and enter pleas of Guilty to each one of those three counts, is that correct?

DEFENDANT HARWOOD: Yes, sir, I am.

THE COURT: And have you discussed this matter with your counsel, Mr. Woods?

DEFENDANT HARWOOD: Yes, sir.

THE COURT: And as indicated by his statement to the Court, has he advised you as to your rights?

DEFENDANT HARWOOD: Yes, completely, sir.

THE COURT: And are you truly conscious of what your rights are in this matter?

DEFENDANT HARWOOD: Yes, sir.

THE COURT: You know what you are entitled to have?

DEFENDANT HARWOOD: Yes, sir.

THE COURT: He has so advised you, is that it?

DEFENDANT HARWOOD: Yes, sir.

THE COURT: And is there anything about it that you don't understand in the proceeding?

DEFENDANT HARWOOD: No, sir.

THE COURT: I see, and have you been furnished at one time with a copy of the Indictment?

DEFENDANT HARWOOD: Yes, your Honor, I have.

THE COURT: And are you familiar with the charges that are contained in Counts 1, 3 and 5?

DEFENDANT HARWOOD: Yes, sir, I am.

THE COURT: And how do you plead as to Count I?

DEFENDANT HARWOOD: Guilty, sir.

THE COURT: And how do you plead as to Count 3?

DEFENDANT HARWOOD: Guilty.

THE COURT: And how do you plead as to Count 5?

DEFENDANT HARWOOD: Guilty.

THE COURT: And in relation to each one of those pleas of Guilty, you know what you are charged with in the counts, is that correct?

DEFENDANT HARWOOD: Yes, sir.

THE COURT: And you have discussed the matter with your attorney?

DEFENDANT HARWOOD: Yes, sir, your Honor, I have.

THE COURT: And are you pleading Guilty to Counts 1, 3 and 5 because you are guilty of the charges contained in those three counts?

DEFENDANT HARWOOD: Yes, your Honor, I am.

THE COURT: In talking about your plea of Guilty to all three counts, has anyone promised you anything in return for your plea of Guilty to those counts?

DEFENDANT HARWOOD: No, your Honor.

THE COURT: And has anyone threatened you in any way to have you plead Guilty to any one of those three counts or all three counts?

DEFENDANT HARWOOD: No, sir.

THE COURT: And you offer that plea realizing the full consequence of your plea, you may be required to serve a term of imprisonment of five years on each one of the three counts or any part of five years?

DEFENDANT HARWOOD: Yes, sir.

THE COURT: And/or pay a fine of $5,000 or any part of $5,000 as to each one of those three counts?

DEFENDANT HARWOOD: Yes, sir.

THE COURT: And knowing of those consequences, do you still plead Guilty?

DEFENDANT HARWOOD: Yes, sir, I do.

THE COURT: All right, the plea will be accepted and the matter will be referred to the Probation Department, and the remaining counts in the Indictment will be taken under advisement for disposition at the time the matter is determined, and the matter will be investigated by the Probation Officer in Bay City.

MR. HAUSNER: Thank you, your Honor, and we ask that the $25,000 personal bond be continued.

THE COURT: The bond will be continued.

MR. WOODS: Thank you.

THE COURT: The Probation Officer at Bay City will contact you sometime in the near future.

MR. WOODS: I have talked to Mr. Adams this morning, your Honor, relative to this. He will check in there, I will take him there at this point and Mr. Adams will take over from there.

THE COURT: All right, Mr. Woods.

MR. WOODS: Thank you.

MR. HAUSNER: Thank you, your Honor.

THE COURT: We'll take a recess.

Under date of September 7, 1973, George E. Woods, counsel for Harwood, directed a letter to Robert B. Smith, the United States Probation Officer who had prepared the pre-sentence report for the Court, and a copy of the said letter was directed to the Court, wherein Mr. Woods requested the Probation Department to interview certain persons to ascertain the extent of cooperation that was alleged to have been furnished by Harwood to the Federal Bureau of Investigation and to the attorney for the bonding company that covered the said bank and, accordingly, the Court joined in this request and was furnished with a supplemental Probation Department report, subsequent to which the matter was set for sentence on October 1, 1973, at which time the transcript of the said sentencing procedure reflects the following:

THE CLERK: Case No. 5613. United States v. Richard L. Harwood.

THE COURT: Mr. Harwood, do you have anything to say before I impose sentence on you?

DEFENDANT HARWOOD: No, sir.

THE COURT: Mr. Woods, do you have anything to say?

MR. WOODS: Just very briefly, your Honor. We have been given all the opportunity possible to cooperate with the Government, with the probation office. Mr. Harwood has done so fully, completely and entirely to the best of my knowledge. I am sure he feels like a very old 47 year old man today and with the six children he has. My personal reference with him is he is remorseful and has come a long way from the initial stages of this proceeding when he harbored some initial passing thoughts of his own self-destruc-

tion for all of this wrong-doing and aggravation that has been caused but he is here today, he is prepared to, as he was earlier on the day of his plea, to put himself on the mercy of this Court and whatever your Honor's judgment is in his regard he is man enough here to take it.

Nothing further.

THE COURT: As you know the matter has been delayed for some time. The Court had the benefit of a supplemental probation report in relation to the cooperation and the Court has taken that into consideration.

The sentence of the Court is you are confined to the custody of the Attorney General of the United States for a term of imprisonment of five years under the provisions of Section 4208(a)2, Title 18. Your attorney, Mr. Woods, will explain that to you.

On October 29, 1973 Harwood, through his counsel Mr. Barry L. Moon of Flint, Michigan, filed a Motion for Withdrawal of Plea of Guilty Rule 32 of the Federal Rules of Criminal Procedure. Said motion reads as follows:

Now comes Defendant Richard Lloyd Harwood, through his attorney Barry L. Moon and moves this Honorable Court to allow withdrawal of his plea of guilty in the instant matter on the basis of manifest injustice worked upon Defendant.

1. Because of the violation of his rights on all premises in partial and as shown more fully by affidavit of Defendant which will be provided for the Court at a hearing on this Motion. A copy of which will be provided to the U.S. Attorney with service of this Motion.

2. Because as a matter of law the spirit of Rule 32 is that due process must be provided in the pre-sentence process and that such due process was not followed or made available in this case. See Defendant's memorandum in support of this Motion and the Companion 28 U.S. §2255 Motion.

3. Because Defendant's plea in light of Rule 11 of the Federal Rules of Criminal Procedure, shoud be re-examined because of pressure exerted on Defendant by an officer of Defendant's former employer, Peoples State Bank of Tawas, Michigan, in that it was threatened that a member of his family would lose his job at said bank if Defendant did not give statements and relent in all proceedings, and that such acts would be rewarded with $500,000 to Defendant if Defendant's cooperation was successful as contemplated by that bank officer.

4. And that if such relention was not forthcoming, Defendant was threatened by said officer referred to in 3, that he, Defendant, would be ground into the financial dust.

On the same date the defendant, through his counsel, filed the Motion to Set Aside Plea of Guilty in Criminal File No. 5613 Under 28 U.S.C. §2255, and the allegations in this motion are identical to the allegations in his motion to set aside the plea under Rule 32.

Rule 32(d) of the Federal Rules of Criminal Procedure reads as follows:

> *Withdrawal of Plea of Guilty.* A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

On November 16, 1973 an evidentiary hearing was had, at which witnesses appeared for the petitioner and for the Government, and extensive testimony was taken in relation to the allegations contained in the motions. From the said testimony the Court drew the conclusion that the issue for determination was the mental status of the defendant at the time he entered his plea of guilty to the three counts set forth in the Indictment.

At the conclusion of this hearing the Court stated, in part, as follows:

> THE COURT: I have to write a memorandum on it, so insofar as the matter itself is concerned I think I have expressed my feelings on it. I feel there is a total lack of support, evidentiary support to the allegations of the motion, the grounds for the motion. I will support that with a written memorandum. [First Tr., p. 162]

On November 21, 1973 Harwood, through his counsel, filed a pleading in both cases entitled "Petition to Reopen and Continue 28 U.S.C. 2255, and Federal Rules of Criminal Procedure 32(d) Hearing," wherein it is alleged, in part, as follows:

> 1. Petitioner, Defendant wishes to have his former counsel Tyrone Gillespie, Attorney at Law, testify as to matters relevant and believed to be critical to the substance of his motions at bar.
>
> (a) Petitioner, Defendant tried to have Tyrone Gillespie present on November 16, 1973 but Mr. Gillespie was unable and unreachable at the time he was sought.
>
> (b) Petitioner, Defendant believes Tyrone Gillespie to have knowledge critical to his case.
>
> 2. In addition Petitioner, Defendant would like to take the testimony of Leopold P. Borrello, Attorney at Law and any persons in his employ, because Petitioner, Defendant believes that person and staff member to possess testimonial and documentary evidence that can be considered by this Court as it pertains to Defendants Motions at bar.
>
> 3. In addition Petitioner, Defendant wishes to make available for this Court's consideration the testimony of other persons that Petitioner, Defendant believes will corroborate testimony and which may elaborate upon testimony that he believes Mr. Gillespie and Mr. Borrello will give.

As a result of this petition for reopening, the hearing was continued on November 28, 1973, at which time Harwood produced the testimony of six witnesses, which included Mr. Tyrone Gillespie who was counsel for Harwood in the criminal matters that grew out of the bank transactions prior to the time that Harwood entered his plea of guilty. As part of his testimony Mr. Gillespie testified that he had numerous conferences with Assistant United States Attorney James Russell in an effort to negotiate a plea, subsequent to which he, Gillespie, recommended to Harwood that he enter a plea to three counts in the Indictment. (Transcript of the hearing of November 28, 1973, at page 25) The substance of the matters presented to the Court at both hearings in support of the defendant's motions involve numerous incidents that are alleged to have happened previous to the time that Harwood entered his plea of guilty to the three counts upon the recommendation of Mr. Gillespie, one of his attorneys. As reflected by the foregoing transcripts of the entry of the pleas of guilty and of the sentence of Harwood, he was invited by the Court to make known any matters that might have affected his ability to enter free and voluntary pleas to the three counts; his failure to inform the Court of any of the matters that he is now relying upon in support of his motions permits the conclusion that he is dissatisfied with the sentence meted out by the Court.

The contention by counsel for the defendant "that such due process was not followed or made available in this case" is without merit. *Tollett* v *Henderson*, 411 U.S. 258, 267 is authority for the following:

> We thus reaffirm the principle recognized in the *Brady* trilogy: a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea

by showing that the advice he received from counsel was not within the standards set forth in *McMann*.

The motion to withdraw the pleas of guilty pursuant to Rule 32 of the Federal Rules of Criminal Procedure is denied, and the motion to set aside pleas of guilty pursuant to 28 U.S.C. §2255 is denied.

(s) Thomas P. Thornton
United States District Judge

Dated: Dec. 17, 1973.

APPENDIX B

NO. 74-1301

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RICHARD LLOYD HARWOOD,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

ORDER
(Filed October 22, 1974)

BEFORE: McCREE, LIVELY and ENGEL, Circuit Judges.

In this appeal from denial of a motion to withdraw a guilty plea, it is contended that the district court failed to comply with requirements of Rule 11 of the Federal Rules

of Criminal Procedure in that there was no factual basis for accepting the plea of guilty. At the time the plea was received the district court addressed the defendant personally and made a determination that the plea was voluntarily given with understanding of the nature of the charge and the consequence of the plea. The court did not inquire as to the factual basis for the plea at that time. However, prior to passing sentence the court had received an extensive pre-sentence report which this court has examined *in camera* and this report contained a factual basis for the plea of guilty. Rule 11 only requires that the court be satisfied that there is a factual basis for the plea of guilty before the entry of judgment, not at the time that the plea is received.

It is also contended that the district court deprived the defendant of a full evidentiary hearing on his motion to withdraw the guilty plea in that the court limited the proof at the hearing. We are of the opinion that the court acted within its sound discretion in determining what evidence to hear and that it did receive sufficient evidence to make a determination as to the voluntariness of the plea.

The defendant also contends that he was entitled to examine the pre-sentence report. Taking note of the arguments made in his brief and before the court, we conclude that the issue is foreclosed by the opinion of this court in *United States* v *Lowe,* 482 F.2d 1357 (1973).

Wherefore it is ORDERED that the judgment of the district court be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk

APPENDIX B-2

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 74-1301

RICHARD LLOYD HARWOOD,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

ORDER STAYING MANDATE
(Filed December 3, 1974)

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT.

(s) John P. Hehman
Clerk

APPENDIX C

RULE 11 — FEDERAL RULES OF CRIMINAL PROCEDURE

A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

APPENDIX D

RULE 32 — FEDERAL RULES OF CRIMINAL PROCEDURE

(a) SENTENCE.

(1) *Imposition of Sentence.* Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment.

(2) *Notification of Right To Appeal.* After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of his right to appeal and of the right of a person who is unable to pay the cost of an appeal to apply for leave

to appeal in *forma pauperis*. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

(b) JUDGMENT.

(1) *In general.* A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

(2) *Criminal forfeiture.* When a verdict contains a finding of property subject to a criminal forfeiture, the judgment of criminal forfeiture shall authorize the Attorney General to seize the interest or property subject to forfeiture, fixing such terms and conditions as the court shall deem proper.

(c) PRESENTENCE INVESTIGATION.

(1) *When Made.* The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

(2) *Report.* The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court. The court before imposing sentence may disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and af-

ford an opportunity to the defendant or his counsel to comment thereon. Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government.

(d) WITHDRAWAL OF PLEA OF GUILTY. A motion to withdraw a plea of guilty or *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

(e) PROBATION. After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation as provided by law.

(f) REVOCATION OF PROBATION. The court shall not revoke probation except after a hearing at which the defendant shall be present and apprised of the grounds on which such action is proposed. The defendant may be admitted to bail pending such hearing.

APPENDIX E

U. S. CONSTITUTIONAL AMENDMENT [V.]

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-861

RICHARD LLOYD HARWOOD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that in accepting his guilty plea the trial judge failed to address him personally as required by Rule 11 of the Federal Rules of Criminal Procedure and that he was denied due process because he was not shown the presentence reports.

On December 27, 1972, a thirty-six count indictment was returned charging petitioner—the president of the Peoples State Bank of East Tawas, Michigan—with making false entries in bank records (18 U.S.C. 1005) and with misapplying and embezzling bank funds (18 U.S.C. 656). On February 5, 1973, petitioner pleaded guilty in the United States District Court for the Eastern District of Michigan to three counts of making false entries in bank records. The remaining counts of the indictment were subsequently dismissed. He was sentenced to five years' imprisonment on each of the three counts, with the sentences to run concurrently.

On October 29, 1973, petitioner filed separate motions under Rule 32, Fed. R. Crim. P., and 28 U.S.C. 2255 seeking to withdraw his plea of guilty . Evidentiary hearings were held on November 16 and November 28, 1973, at the conclusion of which the district court denied both motions (Pet. App. A). The court of appeals affirmed (Pet. App. B).

At the time petitioner tendered his guilty plea, the district court judge addressed him in part as follows (Pet. App. A, pp. 12-13):

> THE COURT: And is there anything about it that you don't understand in the proceeding?
>
> DEFENDANT HARWOOD: No, sir.
>
> THE COURT: I see, and have you been furnished at one time with a copy of the Indictment?
>
> DEFENDANT HARWOOD: Yes, your Honor, I have.
>
> THE COURT: And are you familiar with the charges that are contained in Counts 1, 3 and 5?
>
> DEFENDANT HARWOOD: Yes, sir, I am.
>
> THE COURT: And how do you plead as to Count 1?
>
> DEFENDANT HARWOOD: Guilty, sir.
>
> THE COURT: And how do you plead as to Count 3?
>
> DEFENDANT HARWOOD: Guilty.
>
> THE COURT: And how do you plead as to Count 5?
>
> DEFENDANT HARWOOD: Guilty.

THE COURT: And in relation to each one of those pleas of Guilty, you know what you are charged with in the counts, is that correct?

DEFENDANT HARWOOD: Yes, sir.

THE COURT: And you have discussed the matter with your attorney?

DEFENDANT HARWOOD: Yes, sir, your Honor, I have.

THE COURT: And are you pleading Guilty to Counts 1, 3, and 5 because you are guilty of the charges contained in those three counts?

DEFENDANT HARWOOD: Yes, your Honor, I am.

The district judge also determined that petitioner was aware of the consequences of his plea (Pet. App. A, pp. 11, 13):

THE COURT: All right, Mr. Woods.

MR WOODS: I have discussed this matter in depth and at length on several occasions with Mr. Harwood, your Honor. He has been advised that he could be tried either by the Court or Jury in this matter. He knows that each one of the three counts carries a maximum of $5,000 fine and/or five years imprisonment.

* * * * *

THE COURT: And you offer that plea realizing the full consequence of your plea, you may be required to serve a term of imprisonment of five years on each one of the three counts or any part of five years?

DEFENDANT HARWOOD: Yes, sir.

THE COURT: And/or pay a fine of $5,000 or any part of $5,000 as to each one of those three counts?

DEFENDANT HARWOOD: Yes, sir.

THE COURT: And knowing of those consequences, do you still plead Guilty?

DEFENDANT HARWOOD: Yes, sir, I do.

The judge ascertained further that petitioner's decision to plead guilty had been made voluntarily (*id.* at 13):

THE COURT: In talking about your plea of Guilty to all three counts, has anyone promised you anything in return for your plea of Guilty to those counts?

DEFENDANT HARWOOD: No, your Honor.

THE COURT: And has anyone threatened you in any way to have you plead Guilty to any one of those three counts or all three counts?

DEFENDANT HARWOOD: No, sir.

Finally, before imposing sentence the district judge stated that he had had the benefit of two probation reports, which had been prepared in accordance with Rule 32(c), Fed. R. Crim. P., and he gave petitioner every opportunity to present any information that might have affected his plea or should have been considered in amelioration of his sentence (*id.* at 15, 18).

1. Petitioner contends that the district judge failed to address him personally, as required by Rule 11 of the Federal Rules of Criminal Procedure, in order to determine whether his decision to plead guilty had been made voluntarily and with complete understanding of the nature of the charges to which he was pleading. At no

point in his petition does petitioner suggest that he did not plead guilty voluntarily or that he misunderstood the charges to which his plea related, apparently being content with the assertion that "where the probability of prejudice to the accused is inherent in the circumstances, it is not necessary to find identifiable prejudice in order to conclude that due process is wanting" (Pet. 6).

The exchanges quoted above conclusively establish that the district judge did comply with the requirements of Rule 11 in the present case. Before accepting the guilty plea tendered by petitioner, the judge undertook to determine whether petitioner had discussed with his retained attorney the alternatives available to him, whether he understood the significance of his actions, the charge that had been made against him, the possible consequences of his proposed plea, and finally, whether he had decided to plead guilty because of threats or promises or because he was in fact guilty as charged. Only after he had satisfied himself with respect to these matters did the judge accept petitioner's plea.[1]

There is no substantial dispute here regarding the applicable legal standards governing this issue. The question is simply whether the particular inquiry undertaken by the district court in this case was sufficient. There is no occasion for this Court to review the conclusion of the two courts below that the inquiry in this particular case was adequate.

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[1]The present case is therefore unlike *McCarthy* v. *United States*, 394 U.S. 459. In that case, the district judge had not asked the petitioner any questions calculated to determine whether he understood the nature of the charges that had been made against him.

2. Petitioner also contends that the district judge erred in not questioning him personally at the time he indicated that he wished to plead guilty to determine whether such a plea had a basis in fact. As noted by the court of appeals, however, Rule 11 does not require that a court explore with the defendant the factual basis of a plea at the time the plea is received. Rather, the rule imposes upon the court an obligation to satisfy itself before the entry of judgment that the plea has a factual basis. The Advisory Committee has suggested that this obligation may be met in any of three ways: (1) inquiring of the defendant; (2) inquiring of the prosecutor; or (3) examining the presentence report. Rule 11, Fed. R. Crim.P., 1966 Notes of Advisory Committee.

In the present case, the district court had examined two presentence reports prior to imposing sentence. The court of appeals made an independent examination of those reports *in camera* and concluded that they contained a sufficient factual basis for petitioner's plea (Pet. App. B, p. 20). Use of the presentence report for this purpose fully comports with Rule 11. See, *e.g.*, *Davis* v. *United States*, 470 F.2d 1128, 1129 n. 2 (C.A. 3).

3. Finally, petitioner contends that he was denied due process because he was not shown the pre-sentence reports. Petitioner does not suggest that he or his attorney asked to see a copy of the reports prior to imposition of sentence, however, or that he has any reason to believe that anything contained in the reports was incorrect. The confidentiality of presentence reports is currently recognized by Rule 32(c)(2), Fed. R. Crim. P., and has been approved by this Court. *Gregg* v. *United States*, 394 U.S. 489, 492; see also *United States* v. *Dockery*, 447 F.2d 1178, 1183 (C.A.D.C.), certiorari denied, 404 U.S.

950, and cases cited therein. In any event, the issue does not warrant review by this Court, since, under the recent amendments to the Federal Rules of Criminal Procedure (62 F.R.D. 271, *et seq.*), scheduled to take effect on August 1, 1975, Rule 32 has been changed to provide generally for the disclosure of such reports.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.

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[2]The new Rule 32(c)(3)(A) provides (62 F.R.D. at 320-321):

> (A) Before imposing sentence the court shall upon request permit the defendant, or his counsel if he is so represented, to read the report of the presentence investigation exclusive of any recommendation as to sentence, unless in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons; and the court shall afford the defendant or his counsel an opportunity to comment thereon.